ANDY BAGINDAH

v.

PP

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
DENIS ONG JCA
[CRIMINAL APPEAL NO: S-05-50-1998]
15 MAY 2000

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Presumption of trafficking - Section 37(da) - Defence of mere denial - Whether trial judge must consider as a separate exercise whether presumption of trafficking rebutted - Findings of trial judge on credibility of witnesses - Whether appellate court should interfere - Whether every person who handled exhibit must be called*

The appellant was charged and convicted under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in 811g of cannabis. This was his appeal against his conviction and death sentence. The appellant contended that: (i) the trial judge had failed to consider, as a separate exercise, whether the presumption of trafficking under s. 37(da) of the Act had been rebutted; (ii) the evidence of two prosecution witnesses were contradictory; and (iii) the green plastic bag tendered as an exhibit was never alluded to by the chemist in his testimony.

Held:
Per Shaik Daud Ismail JCA

[1] The circumstances in the present case did not warrant the trial judge undertaking a separate exercise to consider whether the appellant had, on a balance of probabilities, rebutted the presumption of trafficking under s. 37(da) of the Act. The present case was distinguishable from the Supreme Court case of *Mohamad Radhi Yaakob v. PP* in that the appellant's defence here was one of mere denial and not of an innocent carrier.

[2] It was for the trial judge to consider whether the discrepancies and contradictions in the evidence of the prosecution's witnesses were material. Since the trial judge had found that they were not, an appellate court, not having seen and heard the said witnesses, should not interfere with his findings on their credibility.

[3] As long as the witnesses called, showed that there was no break in the chain of evidence pertaining to the said exhibit, there was no necessity to call every person who handled the exhibit as a witness. Moreover, there was no evidence that the exhibit had been tempered with.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu dituduh dan disabitkan kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') mengedar 811g cannabis. Ini adalah rayuan beliau terhadap sabitan dan hukuman matinya. Perayu menghujjah bahawa: (i) hakim perbicaraan telah gagal untuk mempertimbangkan, secara suatu latihan terasing, samada anggapan mengedar di bawah s. 37(da) Akta telah dapat dipatahkan; (ii) keterangan dari dua saksi pendakwaraya adalah bercanggah; dan (iii) beg plastik hijau yang dikemukakan sebagai eksibit tidak disentuh oleh ahli kimia dalam testimoninya.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Keadaan dalam kes ini tidak mewajarkan hakim perbicaraan untuk mengadakan suatu latihan terasing untuk mempertimbangkan samada perayu telah, pada imbangan kebarangkalian, mematahkan anggapan mengedar di bawah s. 37(da) Akta. Kes ini berbeza dari kes Mahkamah Agung *Mohd Radhi Yaakob v. PP* di mana pembelaan perayu di sini merupakan penafian semata-mata dan tidak sebagai seorang pembawa yang ikhlas.

[2] Adalah untuk hakim perbicaraan untuk merpertimbangkan samada percanggahan dan penyangkalan dalam bukti saksi pendakwaraya adalah penting. Oleh kerana hakim perbicaraan telah mendapati bahawa ianya tidak, mahkamah rayuan, oleh kerana tidak dapat melihat dan mendengar saksi-saksi berkenaan, tidak sepatutnya campur tangan dengan keputusan beliau berkenaan dengan kebolehpercayaan mereka.

[3] Selagi saksi-saksi yang dipanggil dapat menunjukkan bahawa tidak terdapat lubang dalam rintetan keterangan berkenaan dengan eksibit berkenaan, tiada keperluan untuk memanggil setiap orang yang telah memegang eksibit tersebut sebagai saksi. Tambahan pula, tiada bukti yang menunjukkan bahawa eksibit tersebut telah diusik.

[Rayuan ditolak.]

Case(s) referred to:
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073 ***(dist)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(da), 39B(1)(a)

For the appellant - VK Liew; M/s VK Liew & Co
For the respondent - K Muniandy DPP

[Appeal from High Court, Kota Kinabalu; Criminal Trial No: K47-01-1997]

Reported by Gan Peng Chiang

JUDGMENT

Shaik Daud Ismail JCA:

The appellant was convicted under s. 39B(1)(a) of the Dangeruous Drugs Act 1952, ("the Act") (revised 1983) in the High Court at Kota Kinabalu on 22 June 1998, for trafficking in dangerous drugs ie, 811 grams of cannabis. The offence was alleged to have been committed on 31 December 1996 at about 3.15pm at the back of Kedai Nam Soon, Pekan Lama Kudat. He was accordingly sentenced to death. He now appeals against the conviction, and sentence.

Several grounds of appeal were put forward but the learned counsel for the appellant centred his argument on three grounds. Firstly, it is his contention that the learned judge failed to carry out a separate exercise under s. 37(da) of the Act as required by the Supreme Court case of *Mohamad Radhi b. Yaakob v. Public Prosecutor* [1991] 3 CLJ 2073. In the Supreme Court case, which is also a drug trafficking case, the court held that unless the evidence in a particular case does not obviously so warrant, it is incumbent upon the court to consider whether on a balance of probabilities defence has rebutted the statutory presumption of trafficking under s. 37(da) of the Act as a separate exercise even though the court is satisfied on balance that the presumption of possession under s. 37(d) of the Act had not been rebutted. On our perusal of the grounds of judgment of the learned judge, we found that he quoted in extenso the findings of the Supreme Court in *Mohamad Radhi's* case and applied the principle therein to the present case. Be that as it may, there is a distinction between that case and the present case. In the present case, the appellant's defence was a mere denial and nothing more. In *Mohammad Radhi's* case the qualifying factor was that, "unless the evidence in a particular case does not obviously so warrant ...". The defence was not a mere denial but that he was in possession of the bag in which the offending drug was found but that he was an innocent and a momentary carrier and called several witnesses in support of that defence. The trial judge (there) simply brushed aside all these and held that since the accused had failed to rebut the

presumption of possession under s. 37(d) of the Act, the presumption under s. 37(da) of the Act had also not been rebutted. As can be seen in the light of the defence therein, the trial judge failed to carry out a separate exercise to consider whether the defence had also rebutted the presumption of trafficking.

In the present case, the appellant had denied possession and the learned judge found that after considering the whole evidence, including that of the appellant, he was satisfied that the prosecution had proved their case beyond a reasonable doubt and the appellant had failed to raise any doubt, we find no reason to disagree with the learned judge. Therefore, the circumstances in the present case did not warrant the learned judge to undertake a separate exercise.

The second ground raised by the appellant was that there were contradictions between two prosecution witnesses namely PW2, Inspector Abdul Rozak bin Muhammad, the leader of the ambush team, and that of PW5, DSP Mohd. Deraman, the Ketua Polis Daerah Kudat.

There is no dearth of authorities to say that in every case, there are bound to be contradictions and discrepancies. The question to be decided by the trial judge is whether those contradictions and/or discrepancies are material ones so as to strike at the very root of the charge. It is for the trial judge to consider this since he was the one who saw and heard the evidence. In the present case the learned judge concluded that there were discrepancies but those discrepancies were not material ones. Since this involved the credibility of witnesses, we held that the learned judge was a better person to decide and an appellate ought not to interfere with such findings.

The third and final ground raised by the appellant was the tender of a green plastic bag in the court as an exhibit when no such green plastic bag was ever mentioned by the chemist when he gave evidence. On this the learned judge rightly held that, there was no necessity to call as witnesses every person who had handled an exhibit. Suffice if those called show that there is no break in the chain of evidence pertaining to the exhibits. We found this to be the right proposition for the learned judge to arrive at. In any case, learned counsel for the appellant before us conceded that in spite of this there was no evidence of any tampering of the exhibits. Therefore, we found no merit on this ground.

On our scrutiny of the evidence we found that there were ample evidence before the learned judge for him to convict the appellant on the charge of trafficking in the 811 grams of cannabis and we saw no reason to interfere, especially when the majority of the findings were findings of fact.

We accordingly dismissed the appeal and confirmed the conviction and the sentence imposed.